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No. 79-265

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

FRANK W. SNEPP, III

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case. This petition is conditioned on the granting of the petition for a writ of certiorari filed by respondent Frank W. Snepp, III, in No. 78-1871, which seeks review of the same judgment. The United States has filed a brief in opposition to that petition. In the event that respondent's petition is denied, the United States requests the Court to deny this petition as well.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 18a-50a)[1] is reported at 595 F. 2d 926. The opinion of the district court (Pet. App. 1a-14a) is reported at 456 F. Supp. 176.

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[1]"Pet. App." refers to the appendix to the petition in No. 78-1871.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1979. On June 12, 1979, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 17, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court correctly imposed a constructive trust, for the benefit of the United States, over all revenues received by respondent from the publication and sale of a book published in violation of an agreement between respondent and the Central Intelligence Agency.

STATEMENT

We incorporate herein the statement on pages 2-6 of our brief in opposition in No. 78-1871.

REASONS FOR GRANTING THE PETITION

For the reasons stated in our brief in opposition in No. 78-1871, the petition for a writ of certiorari filed by respondent should be denied. If that petition is granted, however, the Court should also grant this cross-petition, so that it may review the entire judgment of the court of appeals.

The court of appeals erroneously concluded (Pet. App. 34a-35a) that the 1968 secrecy agreement created a fiduciary relationship between respondent and the Central Intelligence Agency only with respect to the disclosure and pre-publication review of classified information acquired by respondent during the course of his employment. In fact, the contract went further. Respondent explicitly acknowledged that he was "undertaking a position of trust" with the Agency, and he agreed not to

publish *any* information relating to the Agency or intelligence activities generally, "without specific prior approval by the Agency" (*id.* at 58a-59a).

The Agency thus agreed to employ respondent and to entrust him with classified information only on the condition that he submit *all* intelligence-related writings for pre-publication review. Because it expected and believed that respondent would comply with his obligations under the 1968 agreement, the Agency afforded respondent access to a variety of sensitive materials, the unauthorized disclosure of which could reasonably have been expected to cause grave damage to the national security. See Executive Order No. 11652, 37 Fed. Reg. 5209 (1972); Executive Order No. 10501, 18 Fed. Reg. 7049 (1953). By publishing *Decent Interval* without first submitting the manuscript to the Agency for review, respondent violated the confidence that the Agency had placed in him and risked revealing classified information wthout affording the Agency an opportunity to prevent that unfortunate occurrence.

Respondent's fiduciary obligation under the 1968 agreement thus extended beyond the requirement that he submit classified material before publication. Pre-publication submission of all intelligence-related material

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[2]For cases holding that an employee has a fiduciary duty to protect confidential information obtained from his employer, see, *e.g.*, *Lear Siegler, Inc.* v. *Ark-Ell Springs, Inc.*, 569 F. 2d 286 (5th Cir. 1978); *Universal Electric Corp.* v. *Golden Shield Corp.*, 316 F. 2d 568 (1st Cir. 1963); *Singer* v. *A. Hollander & Son*, 202 F. 2d 55 (3d Cir. 1953); *Hunter* v. *Shell Oil Co.*, 198 F. 2d 485 (5th Cir. 1952). See also *E. W. Bliss Co.* v. *United States*, 248 U.S. 37 (1918); *United States* v. *Marchetti*, 466 F. 2d 1309, 1316 (4th Cir.), cert. denied, 409 U.S. 1063 (1972) (even absent an express agreement, the law would imply an obligation not to disclose classified information); *Restatement (Second) of Agency* §395 & Comment a, §383 (1958).

was necessary to protect the classified information with which respondent was entrusted and to ensure that the unauthorized disclosure of such information would not occur.[2] By violating his contract in the way that he did, respondent breached his fiduciary duty to the Agency. Equity requires that he not be permitted to profit from such a breach.

It is well settled that equity will impose a constructive trust on any profits that an agent may receive as the result of a breach of a fiduciary relationship. See *Restatement (Second) of Agency* §403 (1958); *United States* v. *Carter*, 217 U.S. 286 (1910); *United States* v. *Kearns*, 595 F. 2d 729 (D.C. Cir. 1978); *United States* v. *Podell*, 572 F. 2d 31, 35 (2d Cir. 1978); *United States* v. *Drumm*, 329 F. 2d 109 (1st Cir. 1964); *Community Counselling Service, Inc.* v. *Reilly*, 317 F. 2d 239 (4th Cir. 1963); *Hunter* v. *Shell Oil Co.*, 198 F. 2d 485 (5th Cir. 1952). A constructive trust is especially appropriate when the damages suffered by the injured party are difficult to measure, as they are here (see Pet. App. 11a, 49a).

Because the court of appeals too narrowly construed the scope of respondent's fiduciary obligation to the Agency, it refused to sustain the district court's imposition of a constructive trust for the benefit of the United States. Such a remedy would be a useful and deserved addition to the compensatory and punitive damages that the court of appeals permitted the government to recover. Under the court's opinion (Pet. App. 36a-37a), punitive damages may well be unavailable unless the government can show that a former employee deceitfully misled Agency officials into believing that he would abide by the terms of his secrecy agreement. Moreover, because, in the court of appeals' view, the recovery of punitive damages would require a jury trial, this remedy would be uncertain (and, as a result, would have a diminished deterrent value). At

least where the failure to submit intelligence-related materials to the Agency for pre-publication review is motivated by the expectation of personal profit, the availability of a constructive trust remedy would provide an important deterrent to future breaches of secrecy agreements like the one signed by respondent in 1968. And, in any event, the Agency should retain the right to determine which remedies it believes are appropriate for any particular breach of an employee's secrecy agreement.

Because the contract remedy provided by the court of appeals appears to be sufficient in this case to protect the Agency's interest, the government has not independently sought review in this Court. If the Court should decide to hear respondent's challenge to the validity of the 1968 secrecy agreement, however, it should also review the court of appeals' refusal to approve imposition of a constructive trust for violation of the agreement except in cases where the government can prove that classified material was disclosed without pre-publication review by the Agency.

CONCLUSION

If this Court grants the petition for a writ of certiorari in No. 78-1871, it should also grant this cross-petition. If the petition in No. 78-1871 is denied, this petition should also be denied.

Respectfully submitted.

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF FRANK W. SNEPP, III IN OPPOSITION

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BRIEF OF FRANK W. SNEPP, III IN OPPOSITION

Frank W. Snepp, III respectfully opposes the conditional petition for a writ of certiorari filed by the United States.

QUESTION PRESENTED

May a constructive trust be imposed on the earnings of a former government employee who, without his employer's permission, publishes unclassified information acquired through his employment?

STATEMENT OF THE CASE

Respondent incorporates the statement on pages 2-7 of his petition in No. 78-1871. However, there is one assertion made in the government's statement of the case – which it has incorporated by reference from its opposition in No. 78-1871 – which is very much in dispute. On page 3, the government alleges that on a number of occasions Mr. Snepp assured CIA officials (including the Director of Central Intelligence) that he would submit his manuscript for pre-publication review. This is not a fact, but an allegation which Mr. Snepp has vigorously disputed and which is one of the issues which the court of appeals has ruled must be decided by a jury. (Pet. App. at 39a).

REASONS FOR DENYING THE WRIT

The court of appeals was correct in ruling that a constructive trust cannot be imposed on a former government employee who publishes employment-related, but unclassified, information without his employer's permission. Furthermore, as the court of appeals concluded, there are no cases to the contrary. (Pet. App. at 35a n.9). The government asserts that because respondent signed a secrecy agreement which called for pre-publication review of his writings, a fiduciary duty to perform this alleged contractual agreement was thereby imposed on him. Although an employment contract may create a fiduciary relationship, *Restatement of Agency, 2d*, §376 (1958), not all breaches of such contracts warrant the extreme remedy of a constructive trust. *Id.*, §400 comment c; §403 comment e. Since the duty to seek permission to publish employment-related information has never been recognized as a fiduciary duty, a violation of that duty does not rise to the level of a breach of fiduciary duty.

Since there is no conflict on this issue among the circuits or among any other courts, the petition should be denied.

Moreover, the government concedes that its interests in this case are sufficiently served by the contractual remedies approved by the court of appeals. (Petition at 5). However, it asserts that punitive damages are an uncertain remedy and an insufficient deterrent for other CIA employees who might publish without submitting to agency censorship. This amounts to no more than a request that this Court fashion a new rule of law, contrary to all existing authority, solely for application in future cases.

CONCLUSION

The conditional cross-petition should be denied.

Respectfully submitted,

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